BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of Contentions.

For the reasons stated herein, it is contended:

I. That the Court erred in holding that the operation of the petitioner's mill could be unnecessarily destroyed by the respondent, and thereby denied to the petitioner the equal protection of the laws contrary to the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

II. That the Virginia statute (ante p. 5) authorizing the respondent to postpone the filing of condemnation proceedings until sixty days after the completion of the construction of the highway violates the due process clause of the Fourteenth Amendment.

III. That the Court erred in holding that the petitioner was not damaged by the operation of the statute and could not challenge its validity.

Unconstitutional Discrimination Against Mill Enterprise.

Distinction between Public Service Enterprises. Contention as to Denial of Equal Protection.

The petitioner contends that by the ruling of the Court (R. 34-36; ante pp. 3-5) he was denied the equal protection of the laws, contrary to the equal protection clause of the Fourteenth Amendment, because the ruling operated to authorize the respondent, who admitted that it was not reasonably necessary, to destroy the operation of the petitioner's grist mill, which is regulated by the State Corporation Commission of Virginia, on the ground that the

operation of petitioner's enterprise is different from the operation of railroads, public utilities and other enterprises regulated by the Commission in that the petitioner's enterprise may be terminated without obtaining the consent of the Commission.

Inadequacy of the Court's Statement of the Mill Question.

The mill issue is not stated adequately in the Court's opinion. By certain remarks the Court indicated the petitioner's contention to be that the mill property was not subject to condemnation regardless of the effect upon the operation of the mill. The Court said that it was alleged in the bill and "admitted" by the demurrer that the respondent, in constructing the highway over the mill race, planned to place "large" cement pipes in the race under the highway. (R 33). There is no statement in the bill that "large" pipes were to be placed in the race. The bill states that the respondent's plan called for "joints of cement pipe to be set in said mill race under the highway * * * for a distance of between 90 and 100 feet * * * in a bend corresponding to the existing course of the race." (R 24; par. 5 of bill.) By stating that they were "large" pipes, the Court created the impression that the water power would not be obstructed and that the operation of the mill would not be affected. Also, the Court said that the petitioner despite several conferences "was unable to impress the highway engineers with the gravity of his objections to the proposed plan." (R 34.) It could have been said also that, according to the allegations in the bill, the highway engineers were unable to impress the petitioner with the seriousness of their intentions to construct the highway over the mill race in a manner that would enable the petitioner to operate the mill by water power. The impression created by the Court was that the highway engineers

patiently considered the petitioner's objections but entertained the belief that the operation of the mill would not be affected by the construction plan which they intended to follow, and believed the petitioner's objections to be incorrect from an engineering standpoint. That is contrary to the allegation in the bill, admitted by the demurrer, that the highway officials "treated lightly the contentions of the complainant in regard to the operation of said mill." (R. 26; par. 10 of bill.) That the respondent and his highway engineers, including the Chief Engineer of the State Highway Department, treated lightly, that is, treated brusquely and unconcernedly the petitioner's contentions is shown by the allegation in the bill, admitted by the demurrer, that on the very day the petitioner was pleading with the respondent's Chief Engineer and other officials at Richmond not to destroy the operation of the mill, the respondent, through his officials, mailed a notice to the petitioner to the effect that the construction of the highway across the mill race would start forthwith (R. 26-27; paragraphs 10 and 12 of bill), and when the bill was filed shortly thereafter the respondent, instead of denying that the highway construction would destroy the operation of the mill, demurred to the bill and admitted the allegation that the construction of the highway over the mill race in accordance with the respondent's plan "would result in a complete break-down of the race and a permanent stoppage of the operation of said mill by water power." (R. 25; par. 7 of bill; R. 30, demurrer.)

The authorities cited by the Court show the Court's inclination to treat the petitioner's contention as being entirely unrelated to the matter of destroying the operation of the mill. The Court cited (R. 35; ante p. 4) 18 Am. Jur., Sec. 94, p. 720; Lewis, Eminent Domain, 3rd Ed., Sec. 445; *New York, L. & W. R. Co.* v. *Union Steamboat Co.*, 99 N. Y. 12; *Diamond Joe Line Steamers* v. *City of*

Davenport, 114 Iowa 432; *Vermont Hydro-Electric Corp.* v. *Dunn*, 95 Vt. 144; *East Bay Mun. Ut. Dist.* v. *City of Lodi*, 6 P. 2nd 325 (Cal. App.); *State* v. *Superior Court of King Co.*, 54 Wash. 365. The first two cases involved steamboat companies. In one it was held that the company was purely a private concern, not subject to any regulation whatever, and for that reason its land could be condemned (*N. Y. L. & W. R. Co.* v. *Union Steamboat Co.*, *supra*). In the other the property condemned was not essential to the operation of the business and was not and could not be used for public purposes because it was not owned outright by the company (*Diamond Joe Line Steamers* v. *City of Davenport*, *supra*). In two of the remaining cases, the property was not being used for a public purpose, and it was held that the property could be condemned (*East Bay Mun. Ut. Dist.* v. *City of Lodi*, *supra*; *State* v. *Superior Court of King Co.*, *supra*). In the last case (*State* v. *Superior Court of King Co.*) the court pointed out very plainly that if the property sought to be condemned is used in the discharge of the owner's public duties "strong evidence of necessity" would be required to support the right to condemn it. In *Vermont Hydro-Electric Corp.* v. *Dunn*, *supra*, the Court actually upheld the contention that the property could not be condemned, and the Court's statement, quoted by the Court below (R. 35-36; ante p. 4), was a pure dictum based upon the statements made by the Court in the steamboat case of *New York L. & W. R. Co.* v. *Union Steamboat Co.*, *supra*, where the property was owned by a company that clearly was not affected with a public interest in any way. The statements in 18 Am. Jur., Sec. 94, p. 720, and in Lewis, Eminent Domain, 3rd Ed., Sec. 445, are not based upon any reasoning, and are merely repetitions of the loose statements made in the decisions cited by the Court, and are based largely upon the ambiguous dictum in

Vermont Hydro-Electric Corp. v. *Dunn, supra.* These authorities do not touch the question of the authority to destroy unnecessarily the operation of a public service enterprise. At most they hold that a property not essential to the operation of a public service enterprise, and therefore not devoted to a public use, may be condemned, which obviously is correct.

Allegations in Bill, Admitted by Demurrer, Showing Unnecessary Destruction of Operation of Mill.

The bill alleged, and the demurrer admitted, not only that the highway construction in accordance with the respondent's plan would destroy the operation of the petitioner's mill (R. 24; par. 7 of bill), but that the destruction of the operation of the mill could be avoided because "an acceptable highway, suitable for modern, heavy through traffic can be constructed on the existing highway without interfering with the operation of said grist mill and at a cost no greater than the cost of the proposed highway through said mill race" (R. 28; par. 15 of bill). By suggesting another plan of construction, the petitioner did not pretend that he had the right to interfere with the respondent's discretion in determining the location of the highway, or that the petitioner's suggestions should be followed because they offered a highway plan that was better than that offered by the respondent. His suggestions were offered in an effort to save the operation of the mill from destruction.

Contentions Regarding the Right to Stop the Operation of the Mill.

Thus, with regard to the mill, the gravamen of the petitioner's suit was that the respondent was not authorized to destroy the operation of the petitioner's mill, devoted to a public use, because it was not reasonably necessary

(R. 24-25, 28; paragraphs 7 and 15 of bill). It was not contended that the respondent was not authorized to condemn the mill race. The petitioner sought to prevent construction over the mill race that would stop the mill from operating. He sought to prevent the flow of water from being stopped, not to stop the condemnation of the mill race through which the water flowed. The petitioner suggested a plan of construction that would not interfere with the operation of the mill (R. 28; par. 14 of bill), but he did not allege and did not contend that that was the only plan by which the operation of the mill could be preserved. The respondent was entirely free to show that it was possible to construct the highway over the mill race in a manner that would not obstruct the water power for the operation of the mill; and if the respondent had been willing to descend from his sovereign position and to do his best to construct the highway over the mill race so as to preserve the operation of the mill, then the controversy over the mill would have been avoided because the law is clear that the property of a public service enterprise is subject to condemnation if the condemnation will not materially interfere with the operation of the enterprise.

By demurring to the bill, the respondent contended that he had the power to destroy the operation of the mill even though it could be reasonably avoided, that he was not under any duty to change his highway construction plan to preserve the operation of the mill, and that he did not intend to change his plan.

Regulation of Mill Enterprise in Virginia.

The Court said that so long as the petitioner's mill remains in operation it is "regulated to some extent by statute" (R. 36; ante p. 5). The Court referred to Va. Code 1942, Sections 3594 and 3595 (shown in Appendix, post p. 66, 67). Under these provisions, the petitioner, in

operating his mill, is required to serve the public, to grind the grist in turn, and as the party bringing the grist shall direct, and to charge not more than one-eighth or one-sixteenth as toll, depending upon the product desired by the customer. By applying to the court for permission, the petitioner may escape these obligations as to all grains except wheat, but he may again be subjected to the statutory control "upon good cause shown" presumably by some customer or by a member of the public.

As the owner of the mill, the petitioner has the statutory power, upon payment of just compensation, to flood the lands of others for the purpose of diverting or otherwise controlling the water course to supply water power for the operation of the mill (Va. Code 1942, Sections 3582-3589; Appendix, post p. 65).

These provisions for the control of the operations of grist mills originated long before the advent of railroads and other modern public service enterprises. (*Varner* v. *Martin*, 21 W. Va. 534.) They were recognized by the highest Court of Virginia in the early days as reflecting the public character of the grist mill. In *Crenshaw* v. *Slate River Co.*, 6 Rand. 245, the Court said: "The whole course of our legislation shows, that mills have at all times been considered great public conveniences and benefits, and as such, taken under the protection, encouragement and regulation of the laws; made in fact public establishments. In proof of this, various laws may be cited; such as those regulating their tolls, their weights and measures, that they shall grind the grist in due turn, etc." In *Boyd* v. *C. L. Ritter Lumber Co.*, 119 Va. 348, the Court referred to the compulsory provisions of the Virginia mill statutes as the feature that distinguishes them from the mill statutes of other States, emphasizing not only the provisions requiring the miller "to grind well and sufficiently all grain received, at certain fixed rates of toll"

but also the provisions compelling the miller "to receive grain for grinding against his will." The original pattern for the Virginia method of regulating mills is found in the early common law (*Munn* v. *Illinois*, 94 U. S. 113, quoting Lord Chief Justice Hale).

While the Virginia statutes regulating the operations of mills are rooted in the early stages of the regulation of enterprises "affected with a public interest", they have not lost their potency and importance. As proof of this, it is sufficient to refer to the stream-lined Virginia statute of 1932 (Acts 1932, p. 886; Va. Code 1942, Sec. 3594a; Appendix, post p. 67), which modernizes and intensifies the regulation of mills by vesting plenary powers of control in the State Corporation Commission of Virginia, which is "the instrumentality through which the State exercises its governmental powers for the regulation and control of public service corporations, and for these purposes the commission is clothed with legislative, judicial and executive powers." (*Jeter* v. *Vinton-Roanoke Water Co.*, 114 Va. 769, 780). Instead of saying, as the Court did, that in Virginia mills must serve the public in a manner that is regulated "to some extent by statute" (R. 36; ante p. 5), the Court had abundant and evident reasons for saying that today in Virginia the operations of mills are regulated to a greater extent and with more particularity than formerly.

Ruling of the Court.

Notwithstanding the allegations in the bill, admitted by the demurrer, that the construction of the highway would destroy the operation of the petitioner's mill, that it was not reasonably necessary to destroy the operation of the mill, and that the operations of the mill are regulated by statute, the Court ruled that the respondent could go ahead without changing his plan and destroy the operation of the

mill because the petitioner is not obligated to continue the operation of the mill and may abandon it at any time. (R. 36; ante p. 5).

The Court's ruling was confined to the power of the respondent to destroy the operation of mills under a general statutory power of eminent domain because if the respondent had possessed express power there would have been no reason for saying that he could destroy the operation of the mill since the petitioner could do so, and also because the Court quoted the language shown in 18 Am. Jur. p. 720: "To exempt property from condemnation under a general grant of the power of eminent domain. * * *" (R. 35; ante p. 4). The respondent's general power of eminent domain is shown in Va. Code 1942, Sec. 1969j(1) (Appendix, post p. 65).

Unsubstantial Character of the Court's Ruling.

Destruction of public service enterprise when it is unavoidable. Under a general power of eminent domain, any public service enterprise may be destroyed if it is shown to be necessary, whether the enterprise is required to obtain the State's permission before terminating or not. (*Adirondack Ry. Co.* v. *N. Y. State*, 176 U. S. 335; *U. S.* v. *So. Power Co.*, Cir. Ct. App. 4th Cir., 852). However, the decision of the Court below seems to be the first to hold that if the enterprise can be terminated without the State's permission, that ground alone is sufficient to authorize its destruction even though the destruction is not reasonably necessary.

Operation of the mill for one hundred and fifty years. The distinction drawn by the Court was not between an enterprise that has terminated and one that has not. The bill stated that because of low water due to a prolonged drouth that existed at the time the bill was filed the mill

was "not operating continuously", but the bill stated that the mill could and would resume operations when the stream was replenished by rains. (R. 22; par. 1 of bill). Obviously the mill did not lose its public character because of the drouth. The bill alleged that the mill has been in continuous operation for nearly one hundred and fifty years except when stopped by the act of God and by the State Highway Commissioner of Virginia. (R. 22, 24; paragraphs 1 and 7 of bill). The stoppage by the act of God was temporary. The stoppage by the act of the Commissioner will be permanent, unless the petitioner is relieved by the Court. The bill shows that the respondent, not the petitioner, is destroying the operation of the mill; yet because the petitioner might destroy the operation of the mill when it is not necessary, the respondent is allowed to do likewise.

Public use not determined by method of termination. All enterprises not devoted to a public use can be terminated without the State's permission, but it does not follow that all enterprises that can be terminated without State permission are not devoted to a public use. Whether the use is private or public is to be determined by the character of the use and not by the method of terminating the use. In *Munn* v. *Illinois*, it was clearly indicated that the right of the owner to terminate the use has no bearing upon the distinction between private and public use. "He may withdraw * * * by discontinuing the use; but, so long as he maintains the use, he must submit to the control." (94 U. S. 113, 126). This language was adopted by the Virginia Court in *Jeter* v. *Vinton-Roanoke Water Co.* (114 Va. 769, 784), where the enterprise of the water company was held to be a public use. A tobacco warehouse, an insurance company, or a milk enterprise, may be terminated without the State's permission, and yet the Virginia Court has held

that the use in these enterprises is a public use, following the decisions of this Court (*Reaves Warehouse Corp.* v. *Com.*, 141 Va. 194, 202; *Aetna Insurance Co.* v. *Com.*, 160 Va. 698, 710; *Reynolds* v. *Milk Com.*, 163 Va. 951, 974). The Court below undoubtedly meant to hold that the petitioner's mill enterprise is a public use subject to the State's control, but that it is different from other public service enterprises because it may be terminated without obtaining the State's permission, and, therefore, it may be destroyed by the respondent even though it is not reasonably necessary.

Public use regardless of extent of control. By stating that the petitioner's mill "is regulated to some extent by statute" (R. 36; ante p. 5) the Court undoubtedly did not mean that for that reason the mill is not devoted to a public use. The extent of the control "by the public for the common good" has no bearing in determining whether the use is public or private. (*Munn* v. *Illinois*, 94 U. S. 113, 126). Before control to any extent may be exercised it must be determined that the use is public. The operation of the petitioner's mill is a public use regardless of the extent of the control.

Infirmity of the trust theory. The Court adopted the test stated in the dictum in *Vermont Hydro-Electric Corp.* v. *Dunn, supra*, viz., "The test whether land is held for a public use such as will exempt it from condemnation is said not to be what the owner does or may choose to do, but what under the law he must do, and whether a public trust is impressed upon it." (R. 35-36; ante p. 4). It is pure fiction to say that a public service enterprise is "impressed with a trust", or that the owner has made a grant to the public. In Freund, Police Power, p. 381, the author makes the following observation: "By making property valuable to the public, the owner is guided by considerations of self-interest, and he expects to derive from the public patronage

a profit commensurate to the public use. There is no purpose, actual or implied, to part with his proprietary control in the least degree. * * * In making his property valuable to the public and offering it to the service of the public, the owner does merely what every business man does who invites indiscriminate public patronage." In *Munn* v. *Illinois*, it was not stated and there is no basis for stating that a grant or a trust does not exist when the State's permission need not be obtained before the public use is discontinued, but that a grant or trust does exist when the State's permission must be obtained before the public use is discontinued. "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." (94 U. S. 113, 126). The petitioner's mill is "impressed with a trust" even though he can destroy the operation of the mill without the State's permission. In view of the legal concepts that have gone over the dam since *Munn* v. *Illinois*, it is better to say that according to the modern concept of "public use", presaged by Freund, Police Power, page 381, there is no basis for applying any fiction at all. (*Nebbia* v. *New York*, 291 U. S. 502; *Olsen* v. *Nebraska*, 313 U. S. 236, 245, 246).

Termination of unprofitable public use. The State has no power to prevent the discontinuance of a use that is unprofitable to the owner. (*Brooks-Scanlon Co.* v. *R. R. Com.*, 251 U. S. 396; *R. R. Com.* v. *E. Texas R. R.* 264 U. S. 79). Ordinarily it is only when the use is unprofitable that the owner desires to discontinue it. The Court might well take judicial notice of the fact that under the system of free

enterprise the motivating factor in the continuation of a business is the profit that it is making for the owner. The owner of an unprofitable use, whether it is a railroad, a grain warehouse, or a grist mill, is protected by the due process clause of the Fourteenth Amendment. The only appreciable difference between these enterprises is that when the use becomes unprofitable a railroad enterprise may stop when its books prove to the satisfaction of the State regulatory body that the use is unprofitable (*City of Portsmouth* v. *Va. Ry. & Power Co.*, 141 Va. 54), while a warehouse or a grist mill may stop when its books prove to the satisfaction of the owner that the use is unprofitable. Even a railroad could stop its unprofitable enterprise without the State's consent if the State made no move. (*Bullock* v. *State of Florida*, 254 U. S. 513; *Ft. Smith L. & T. Co.* v. *Bourland*, 267 U. S. 330).

Distinction drawn by the Court. The distinction made by the Court affects all enterprises regulated by the State. The distinction is between a regulated enterprise that may stop by permission of the State and a regulated enterprise that may stop without such permission. The operations of the former are protected, while the operations of the latter are not protected, from unnecessary destruction by the State Highway Commissioner of Virginia acting under his general power of eminent domain.

Taking by Eminent Domain Without a Showing of Necessity.

The legislature may authorize a taking by eminent domain without a showing of necessity (*Rindge* v. *Los Angeles Co.*, 262 U. S. 700), and this would seem to be true where the property condemned is a public service enterprise. Absolute discretion of the State Highway Commissioner of

Virginia was denied in *So. Ry. Co.* v. *Com.*, 290 U. S. 190, but that was where the railroad had to bear a part of the cost of eliminating a crossing. Undoubtedly the legislature could expressly authorize the respondent to condemn and to destroy the operations of all public service enterprises without making a showing of necessity where full compensation is paid (*Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685).

EQUAL PROTECTION IN THE EXERCISE OF EMINENT DOMAIN.

The State's power of eminent domain is subject to the inhibitions of the Fourteenth Amendment. Without denying equal protection of the laws, the State may expressly authorize the taking of grist mills and other water power enterprises for the development of a water power project, as in the Alabama statute upheld in *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Ala. Interstate Power Co.*, 240 U. S. 30. Clearly, in that case, the water power operations of grist mills were inconsistent with the proposed water power operations of the power company which the legislature desired to encourage and develop for the common good. But, if the project had been that of the Alabama Telephone Company it would not have been reasonable for the legislature to single out grist mills and other water power projects and authorize their destruction by the telephone company. Likewise, it would not be reasonable to single out grist mills and water power projects and authorize their destruction by the State Highway Commissioner for road purposes. In the Alabama statute (quoted in 186 Ala. 622, 65 S. 287, 292) the basis upon which certain enterprises were exempted clearly showed that it was directly and reasonably related to the accomplishment of the legislative purpose. Besides, the rights of the owners of grist mills were not before the Court.

LACK OF REASONABLE RELATION.

The Court below did not single out grist mills, but the Court selected the class of public service enterprises to which the petitioner's mill belongs, namely, those that may terminate without the State's permission. In discriminating against public service enterprises of this type, the Court denied to the petitioner the equal protection of the laws, contrary to the Fourteenth Amendment, because it can not be shown that the operations of such enterprises, as distinguished from others, would have a special tendency to interfere with the accomplishment of the respondent's purposes in the construction of highways, and because there is no reasonable relation between the owner's right to terminate the enterprise and the burden of the respondent to show reasonable necessity for destroying the enterprise (*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Smith* v. *Cahoon*, 283 U. S. 553; *Hill* v. *Texas*, 316 U. S. 400; *Skinner* v. *Oklahoma*, 316 U. S. 535).

In *Smith* v. *Cahoon*, 283 U. S. 553, 566, 567, it was recognized that the State could regulate all private carriers for hire in the interest of public safety but the distinction in the statute between carriers hauling tea, coffee, etc., and carriers hauling dairy products, etc., was held invalid because there was no reasonable relation between public safety and the character of the articles transported. So here, it is recognized by the petitioner that the State could authorize the respondent to destroy the operations of all public service enterprises without a showing of necessity, but the petitioner contends that the distinction between a public service enterprise terminable without permission from the State and one that is terminable by permission from the State is invalid because there is no reasonable relation between the power of the respondent to destroy the operations of public service enterprises unnecessarily and the

extent of the statutory regulation of public service enterprises.

The distinction between a public use terminable without State permission and one terminable by State permission emanates from the regulatory policy of the State. It has no relation to eminent domain. That it is a reasonable distinction in the field of regulation is not a valid reason for saying that it is a reasonable distinction in the field of eminent domain. That a public service enterprise may be terminated under the State regulatory policy without proving before a State body that the use is unprofitable is no reason for giving to another State body the authority to destroy the enterprise without proving before the court that it is reasonably necessary. It is unreasonable for the State to give to the respondent absolute control over the termination of the petitioner's enterprise merely because the State has already given to the petitioner absolute control over the termination of his enterprise. There is no reasonable relation between absolute administrative control and absolute private control of a public use. Various distinctions are made by the State in formulating regulations for the control of public service enterpises. Railroads must meet requirements that are not applicable to telephone, light, or power companies, or to public warehouses, or grist mills, but that is no reason for authorizing the respondent to destroy unnecessarily all of these enterprises except railroads.

The respondent's burden of showing reasonable necessity for destroying the operation of a public service enterprise is related to the problem of highway construction. The burden is not made difficult because of the petitioner's right to destroy the operation of the mill without the State's permission. Whether the respondent's burden is great or small will depend upon a variety of engineering problems in the construction of the highway. The burden would be to show

that a satisfactory highway can not be constructed except on a course through the mill race and that it is not possible to construct the highway through the race without destroying the operation of the mill, or that the highway can be constructed through the race in a manner that will not cause interference with the operation of the mill. These technical problems of highway engineering are wholly unrelated to the petitioner's right to terminate the operation of the mill without the State's permission.

There would not have been a denial of equal protection of the laws if the Court had held that the respondent could destroy the operation of the mill without making a showing of necessity before the State Corporation Commission because the petitioner could terminate the operation of the mill without making a showing of necessity before the State Corporation Commission. That is not what the Court held. The discrimination would have been unobjectionable if the Court had held that because the petitioner could terminate the mill voluntarily the respondent could destroy the operation of the mill without a showing of necessity unless the petitioner himself should raise the question of necessity for the destruction. That was not the Court's holding. The Court held that even though the petitioner raised the question of necessity and alleged that it was not reasonably necessary to destroy the operation of the mill, and even though the respondent admitted that to be true, still the respondent, without making a showing of any kind, could terminate the operation of the mill because the petitioner could terminate it without obtaining permission from the State Corporation Commission.

The distinction thus drawn by the Court is wholly artificial, unsubstantial and unreasonable. It does not rest upon any authority, and it is contrary to the principles of equal protection established by this Court, as shown by the decisions which have been cited.

II.

Unconstitutionality of Statute Authorizing Postponement of Condemnation Proceedings.

One-Sided Provisions of the Statute.

The Virginia statute (Va. Code 1942, Sec. 1969j(4); ante p. 5), under which the respondent seized and mutilated the petitioner's property before instituting condemnation proceedings, violates the due process clause of the Fourteenth Amendment to the Federal Constitution because the procedure provided by the statute is a one-sided procedure weighted in the respondent's favor. The one-sided feature of the statute is shown by the following provisions:

> "Within sixty days after the completion of the construction of such highway * * * the said commissioner shall institute condemnation proceedings."
>
> "It is the intention of this section to provide that such property and rights of way may, in the discretion of the commissioner, be condemned after the construction of the highway, as well as prior thereto * * *"

Inadequacy of Court's Statement of Contentions.

The Court stated that the petitioner contended that the statute is unconstitutional because it "does not authorize the institution of condemnation proceedings until sixty days after the completion of the construction of the highway; that such construction might be indefinitely delayed; and that consequently the property owner might be unreasonably delayed in being compensated for the taking of his property or the damage done thereto" (R. 36; ante p. 7). This is not an accurate statement of the petitioner's contention because it emphasizes the delay of the respondent in instituting proceedings rather than the restraint imposed upon the owner by the statute as soon as the property is seized under the statute. The Court's statement is signifi-

cant in view of the holding that since the respondent did not delay the proceedings unreasonably the petitioner could not attack the statute, and that it was therefore unnecessary to decide what would have been the petitioner's rights "if the payment of such compensation has been unreasonably delayed" (R. 37; ante p. 7).

PETITIONER'S CONTENTION AS TO UNCONSTITUTIONAL FEATURE.

In the bill the petitioner alleged that the statute is unconstitutional "in that the condemnation proceedings may be postponed for an unreasonable length of time, to-wit sixty days after the completion of the construction of the highway" (R. 27; par. 12 of bill). In this allegation the concept of restraint is expressed in the word "postponed". The word "postpone", according to Webster's dictionary, means "to put off", "to delay", "to put (a person) off", "to keep (a person) waiting". The bill did not allege that the statute is unconstitutional because the condemnation proceedings may be "instituted" by the respondent within sixty days after completion of the highway, or because the time is unreasonable in that it is sixty days after completion of the highway rather than a particular number of days after the property is seized. The bill alleged that the statute authorizes the respondent to "postpone" the proceedings, that is, to keep the land owner waiting, until sixty days after completion of the highway, or until some other date which the respondent is free to select within that time, and that because of this restraint imposed upon the owner the statute is unreasonable and allows the taking of property without due process of law (R. 27, par. 12 of bill; R. 29, prayer of bill). The plain meaning of the allegation in the bill is that the statute is unconstitutional because the restraint upon the owner is a matter which the statute places entirely "in the discretion of the commissioner", and not

because the statute does not recite the proper number of days for the postponement of the proceedings.

The petition for appeal states that the statute (ante p. 5) "does not provide for the institution of proceedings within a reasonable time after the property has been taken," that "where the statute permits an unreasonable time in which the highway official may bring the action the statute is valid if it provides that the owner also may bring an action freely and promptly on his own motion," and that the test of the invalidity of the statute "is whether it allows the highway official an unreasonable time in which to bring the action without authorizing the owner to bring an action upon his own motion" (R. 13). The petitioner's contentions with respect to the restraining feature of the statute were repeated in the allegations contained in the petition for rehearing (R. 44).

These allegations in the bill, in the petition for appeal, and in the petition for rehearing, were sufficient to apprise the Court of the petitioner's contention that the statute is one-sided, unreasonable, and unconstitutional because of the restraint imposed by the statute upon the owner while the respondent postpones the condemnation proceedings and mutilates the property.

It is recognized that a taking and mutilation of property under eminent domain before title is acquired is not objectionable per se. Where the taking and mutilation are preceded by the filing of condemnation proceedings, the procedure is not one-sided because the owner's remedy lies in the pending proceedings. Where the taking and mutilation are not preceded by the filing of proceedings and the owner is left free to act on his own motion, the procedure is not one-sided even though the authorities taking the property are not specifically required to institute proceedings at any particular time (*Bragg* v. *Weaver*, 251 U. S. 57; *Joslin Mfg. Co.* v. *City of Providence*, 262 U. S. 668). The

constitutional test is whether the owner is restrained while his property is being mutilated. The Virginia statute (ante, p. 5) not only authorizes the respondent to take and mutilate the property before instituting proceedings, but it provides also that the respondent is not under any duty to file proceedings until sixty days after the completion of the highway, and that the time for instituting proceedings, within this maximum period, is a matter that resides "in the discretion of the commissioner." The discretion is to be exercised by the respondent, not by the land owner. By these provisions the land owner is stripped of the power to act freely on his own motion while the respondent is postponing the institution of proceedings and at the same time mutilating the property ad libitum.

Application of the Constitutional Principle.

In *McGibson* v. *Roane County Court*, 95 W. Va. 338, 121 S. E. 99, the Court held invalid the West Virginia statute which authorized the County Court to enter upon any lands and locate and build a road, "and sixty days after said road is completed" to cause the damages and benefits to be assessed by viewers, without authorizing the owner to bring action. The Court said that the owner must not be put to unreasonable delay, and that it is essential "that the remedy be one to which the party can resort on his own motion; if the provisions be such that only the public authorities appropriating the land are authorized to take proceedings for the assessment, it must be held to be void," (quoting from Cooley, Const. Lim., 7th Ed., p. 815). "Tested by these principles", said the Court, "where does the land owner stand under the provisions of the statute? The county court may enter on his land, deprive him of possession, and it is not required to take a single step toward even ascertaining the amount of the compensation to be paid until sixty days after the work is completed. The work

might be delayed for years; so that the time in which payment is to be made might be delayed for a like period. Again, the owner is given no right to initiate proceedings. He is not authorized to resort to the remedy provided by the statute; that is given to the court alone. For these reasons we hold these statutes invalid." Clearly the unconstitutional feature of the West Virginia statute was that the land owner was "not authorized to resort to the remedy" and could not compel the road authorities to act. If the land owner had been left free to act, the statute would have been valid regardless of the amount of time for which the road officials were allowed to postpone proceedings, because the land owner could have prevented any delay.

As in the West Virginia statute, the respondent under the Virginia statute (ante p. 5) "is not required to take a single step toward even ascertaining the amount of the compensation to be paid until sixty days after the work is completed". Mandamus does not lie until the duty arises, and, therefore, the respondent could not be compelled by mandamus to bring an action until sixty days after completion of the highway. Under the Virginia statute (ante p. 6) the land owner "is given no right to initiate proceedings." The owner "is not authorized to resort to the remedy provided by the statute; that is given to the (respondent) alone."

Because of the restraint imposed by the statute upon the land owner, the statute is one-sided, unreasonable, unnecessary, and wholly lacking in due process (*Bragg* v. *Weaver, supra; Joslin Mfg. Co.* v. *City of Providence, supra; McGibson* v. *Roane County Court, supra.*)

Right of Petitioner to Attack Statute in Question.

APPLICATION OF PREMIER-PABST SALES CO. v. GROSSCUP.

The petitioner's right to attack the statute (Va. Code 1942, Sec. 1969 j(4); ante p. 5) was denied on the ground that he was not damaged by the operation of the statute,

and the ruling was based upon *Grosso* v. *Com.*, 177 Va. 830, 839; *Morgan* v. *Com.*, 168 Va. 731, 737; *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226, 227. (R. 37; ante p. 7) Grosso, the chiropractor, could not display a diploma. Morgan, the vagrant, was unable to show that he had associated with respectable people. Premier-Pabst was unable to qualify as a beer distributor. These decisions turned on the status of the party attacking the statute.

As stated in *Premier-Pabst Sales Co.* v. *Grosscup*, "One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him." (298 U. S. 226, 227) He must show (1) that an unconstitutional feature of the statute came into operation, and (2) that he was injured by the unconstitutional feature. In the *Premier-Pabst* case, where only the second element of the rule was considered, the Court said that the complainant could not qualify as a distributor of beer because of non-residence, and, therefore, was not injured by the alleged unconstitutional feature of a statute requiring licenses from distributors. Here, however, the Court below, having only the first element of the rule to consider, held that no unconstitutional feature came into operation by saying that it was unnecessary to decide what would have been the petitioner's rights "if the payment of such compensation had been unreasonably delayed." (R. 37; ante p. 7). If an unconstitutional feature of the statute did operate, the petitioner was injured by it because he owns the property which was seized and mutilated under the power granted by the statute. (*U. S.* v. *Chandler-Dunbar Co.*, 229 U. S. 53).

Injury from Restraining Feature of Statute Prior to Filing Injunction Suit

The unconstitutional feature of the statute (ante p. 5) lies in the one-sided provisions which restrain the owner

while the respondent postpones the proceedings and mutilates the property. The meaning of the statute is that the owner shall have no right to institute proceedings on his own motion or to compel the respondent by mandamus to do so during a period of time which commences with the date upon which the respondent enters the property and commences the highway and ends with the date upon which the respondent, in his discretion, institutes condemnation proceedings regardless of what date he selects for instituting proceedings so long as the date is not later than sixty days after the completion of the highway. (See pages 41-44, ante).

The unconstitutional feature of the statute operates as soon as the procedure of the statute is placed in operation. The unconstitutional feature of the statute began to operate against the petitioner when, as alleged in the bill and admitted by demurrer (R. 27-28, 30) the respondent, acting under the statute, made a deposit, notified the petitioner and seized and mutilated the petitioner's property. The statute restrained the petitioner just as effectively as if the respondent had seized and imprisoned the petitioner at the same time that he seized and mutilated the property. In the petition for appeal, the petitioner presented to the Court the contention that he had the right to challenge the constitutionality of the statute "because (a) his property has been taken by authority of the statute, (b) he has been subjected to the appellee's power, under the statute, to delay the bringing of condemnation proceedings until sixty days after the completion of the highway, and (c) the statute has completely stripped him of all power to institute proceedings on his own motion, or to compel the appellee to institute proceedings within a reasonable time." (R. 20).

The restraint was imposed upon the petitioner by the statute before the petitioner filed the injunction suit. When the injunction suit was filed the respondent had been on the

petitioner's property for five days, acting under the authority of the statute, and during that time the petitioner was pushed aside and held back by the statute while the respondent and his highway forces, with steam shovels, trucks, and other heavy equipment, carved away and made deep gorges on the petitioner's property. (R. 27, par. 13 of bill; bill filed October 21, 1941, R. 21). At the time the bill for injunction was filed it was not necessary to show that the respondent had waited an unreasonable time because the petitioner had already been affected by the unconstitutional restraining feature of the statute. The statutory restraint was placed in operation against the petitioner by the respondent's seizure and mutilation, not by his delay. The respondent's delay in instituting proceedings simply measured the duration of the statutory restraint which began when he seized and mutilated the property. This point was specifically presented to the Court in Point 7 of the petition for appeal. (R. 18-19). Rights accorded to the petitioner by the due process clause of the Fourteenth Amendment to the Federal Constitution were invaded by the restraining provisions of the statute when the respondent invaded the property. (*Bragg* v. *Weaver, supra; McGibson* v. *Roane County Court, supra; Lawrence* v. *State Tax Com. of Miss.*, 286 U. S. 276, 282, 283).

Ruling of the Court Based upon the Statement in the Attorney General's Brief.

Circumventive Acts of the Respondent.

Although the Court's attention was specifically directed to the petitioner's right to attack the statute because of the restraint imposed upon the petitioner before the injunction suit was filed (R. 18-19, point 7 in petition for appeal; R. 20, par. in conclusion of petition for appeal; R. 39, 44, petition for rehearing), the Court not only did not

give any reason to overthrow the petitioner's contention but did not even mention it. There is nothing in the Court's opinion to indicate that the Court even considered the petitioner's contention. The Court turned away from the petitioner's contention and fastened its attention upon the statement in the Attorney General's brief (shown in Appendix, post p. 67-68) in which the Attorney General disclosed the artificial defense that was contrived by the respondent to circumvent the attack upon the statute and to protect the respondent's seizure and mutilation of the property.

The Attorney General evaded the question of restraint imposed by the statute, made it appear that the only invalid feature of the statute was the possibility that the respondent might delay proceedings unreasonably, and that this invalid feature was not in operation because the respondent did not delay the proceedings unreasonably. To establish this defense it was necessary, of course, to show to the Court that the proceedings had been instituted by the respondent, and that they were instituted at a time that was logical and reasonable. The proceedings were instituted by the respondent, and as proof that they were instituted for this artificial purpose it is sufficient to point out that they were not instituted before the seizure of the property, or while the property was being mutilated, but only after the appeal in this cause was granted by the Court below and at the time when the respondent was about to present his defense to the Court. The appeal in this cause was placed on the docket for the June session of the Court, which began on June 7, 1943. On June 17, 1943, the respondent instituted condemnation proceedings in the Circuit Court for Fairfax County. These are facts shown of record, which can not be denied. These dates were not disclosed by the Attorney General, but instead he stated that since the granting of the appeal "the highway has been

completed and condemnation proceedings have been instituted." (Appendix, post p. 68). He could have said that since the granting of the appeal "the case has been placed on the docket and condemnation proceedings have been instituted." In the petitioner's reply brief he denied the Attorney General's statement that the road had been completed by stating that the condemnation proceedings were not instituted because the road was completed "because it has not been completed." However, for some reason not known to the petitioner, the Court accepted the statement of the Attorney General solely because, so the Court said, it was not denied by the petitioner. The words of the Court are as follows: "It is stated in the brief of the Attorney General, and not denied by the appellant, that since the present proceeding has been pending in this court the highway has been completed and condemnation proceedings * * * have been instituted." (R. 36; ante p. 7). The petitioner did not deny, of course, that the proceedings were instituted, but he denied that the highway was completed and his denial was stated in his brief just as plainly as the Attorney General's statement was made in his brief, and, in addition the petitioner repeated his denial in the petition for rehearing. (R. 39). The Court was not justified in ignoring the petitioner's denial and then stating that the proceedings were instituted after the highway was completed because the Attorney General said so and the petitioner did not deny it, especially since the Attorney General manifestly relied upon the statement that "the highway has been completed" to give to the condemnation proceedings a color favorable to the respondent's defense. If he had stated that the proceedings were not instituted until one year and eight months after the property was seized and that they were instituted just ten days after the appeal in the injunction suit was placed on the Court's docket, then the respondent would not have appeared in the

role of one who is seeking equity by doing equity and coming into equity with clean hands. When all the facts are disclosed, the real purpose of the institution of the proceedings becomes apparent. Instead of being equitable proceedings to serve the petitioner's interests, the proceedings were used as a weapon to defeat the petitioner's constitutional rights.

This arbitrary conduct of the respondent in instituting proceedings after "the highway has been completed" demonstrates that the purpose and effect of the provision in the statute, "in the discretion of the commissioner" (ante p. 6), is to empower the respondent (a) to postpone the proceedings until he completes the highway and (b) to determine the date upon which the highway is to be considered as being in a state of completion, thus not only restraining the owner while postponing the proceedings but also controlling the period during which the owner can be restrained. This is eminent domain "running riot." "No such plenitude of power is susceptible of transfer. The statute, however, aims at nothing less, as one can learn both from its terms and from the administrative practice under it." (*Schechter* v. *U. S.*, 295 U. S. 495, 553).

Allusion to Waiver.

The Court alluded to a waiver of the constitutional question by saying that "By consent of both sides such condemnation proceedings were delayed in the lower court pending the determination by us, in the present appeal, of the right of the State Highway Commissioner to condemn the property in question" (R. 36-37; ante p. 7). The implication that the constitutional question was dropped by consent is utterly groundless; it was made "without reference to any evidence, upon proofs drawn from the clouds." The Court will not "presume acquiescence in

the loss of fundamental rights" (*Ohio Bell Telephone Co. v. Public Utilities Com. of Ohio*, 301 U. S. 292, 307). It is incredible that the Court below set forth expressly, in two whole paragraphs of the opinion (ante p. 6-7), the petitioner's contention that the statute is unconstitutional, and then followed these paragraphs with a statement implying that the petitioner consented not to attack the statute on the appeal. If the petitioner dropped the attack on the statute, it was not necessary for the Court to hold that the petitioner was not damaged by the operation of the statute and that he could not attack the statute since it does not concern him "that the statute complained of might violate the rights of others" (R. 37; ante p. 7). If the statute was "complained of," as stated by the Court, it could not be said that the attack on the statute was dropped by the petitioner who "complained of" it.

The purported source of the Court's implication was the statement in the Attorney General's brief, but there is nothing whatever in his statement to justify the implication. He said, in the clearest language, that "There are three questions involved in the case * * * and Third, whether the provisions of Section 4 of Chapter 380 of the Acts of Assembly of Virginia of 1940 are constitutional." (Appendix, post p. 67). He said that the constitutional question had not become moot (p. 68). If the petitioner had by consent dropped the attack on the statute, most certainly the Attorney General would not have stated that one of the questions in the case was whether the statute is constitutional, and that the constitutional question was not moot.

Real Ground of the Ruling.

Since the Court relied upon the Attorney General's statement, the Court in effect accepted the argument contained in the statement. The Attorney General did not

rely upon waiver by consent or by any other means or circumstance. He did not even mention waiver or consent. He argued, not that the petitioner had by consent dropped the constitutional question, but that the question "insofar as this case is concerned, has become largely academic," that is, not entirely academic but "largely" so; that the constitutional question "has no bearing upon the right to condemn the land," which is a veiled contention that the use of the property for highway purposes prior to condemnation is valid even though the statute authorizing the use is unconstitutional; that "even if this Court should hold that the statute allowing the Commissioner to take possession before condemning the property is not valid, no substantial gain would result to the appellant," that is, some gain would result to the petitioner but no "substantial" gain would result to him; and, finally, that the question "has not, of course, become moot since title to the land has not yet actually been acquired, but the question is no longer of great importance in this particular case," that is, the question is of some importance to the petitioner but not of any "great" importance to him (ibid). This frivolous and frustrative line of argument is equivalent to saying that the statute under attack has conferred upon the respondent the power, by instituting proceedings just at the zero hour, to defeat any attack that is made on the statute while he is mutilating the property and to render the question concerning the validity of the statute academic or real, unsubstantial or substantial, insignificant or important, and that in this particular case he chose to make the question largely academic and of no great importance by simply filing the proceedings at the strategic time, and that the Court would be indulging in a fruitless endeavor in considering the constitutional question in this case.

While the Court did not say that the respondent has the power to thwart the consideration of the federal question,

the Court held in effect that since the Court was of the opinion that the property could be condemned the constitutional question was not a material question now that the proceedings are available for ascertaining compensation. "Since we are of opinion * * * that such property is subject to condemnation * * * the appellant is now afforded a prompt remedy in such proceedings for obtaining just compensation * * *" (R. 37; ante p. 7). The reasoning of the Court is the same as that advanced to defeat the federal question in *Lawrence* v. *State Tax Com. of Miss.*, 286 U. S. 276, 281-283. The Court held, in effect, that assuming the invalidity of the provision in the condemnation statute authorizing the respondent to construct the highway before condemning the property, still the petitioner's property is subject to condemnation and consequently the constitutionality of the provision in the statute is immaterial. But the Court overlooked the fact that the petitioner's constitutional rights were infringed when the property was seized and the petitioner was restrained by the provision in the statute. (*Bragg* v. *Weaver*, *supra*.) The petitioner's constitutional rights were denied by the refusal of the Court to decide the constitutional question because the unconstitutional feature complained of was left undisturbed by the Court whose jurisdiction to remove it was rightly invoked. The purported non-federal ground put forward by the Court for its refusal to decide the constitutional question was unsubstantial and illusory, and the petitioner may invoke the jurisdiction of this Court to decide the question (*Lawrence* v. *State Tax Com. of Miss.*, *supra*; *Brown* v. *Miss.*, 297 U. S. 278, 287).

INJURY FROM RESTRAINING FEATURE OF STATUTE AFTER FILING OF INJUNCTION SUIT.

Granting, for the sake of argument, that before the filing of the injunction suit the petitioner was not damaged by the operation of an unconstitutional feature of the statute

(ante p. 5), notwithstanding the fact that for five days the petitioner was held back by the statute while the respondent mutilated the petitioner's property (ante pp. 45-47), still after the injunction suit was filed the petitioner was held back by the statute for a period of one year and eight months while the respondent postponed the filing of condemnation proceedings and excavated through the hill on the petitioner's property.

The Attorney General stated that the condemnation proceedings were not filed until "the granting of an appeal" by the Court (Appendix, post p. 68), which was on March 5, 1943 (R. 21), one year and five months after October 16, 1941, when the respondent began to mutilate the property (R. 27, par. 13 of bill; admitted by demurrer, R. 30). He stated also that after the proceedings were filed the postponement of actual acquisition of title to the land was "no longer due to the action of the State Highway Commissioner" (Appendix, post p. 68). Through these statements by counsel the respondent admitted that the filing of proceedings was postponed for at least one year and five months after he began to mutilate the property, and that the postponement of the filing of proceedings was due to his own act. "The power of the court to act upon facts conceded by counsel is as plain as its power to act upon evidence produced (*Best* v. *Dist. of Col.*, 291 U. S. 411, 415).

Although the Court expressly relied upon the Attorney General's statement to defeat the petitioner's attack upon the statute (R. 36; ante p. 7), and although the facts were plainly shown in the statement and in the admitted allegations of the bill, the Court did not mention the respondent's delay of at least one year and five months, or any delay at all, in the filing of the proceedings, and did not mention the Attorney General's statement that the proceedings were filed after the appeal was "granted", the date of which was shown of record. He said that since the

"granting of an appeal by this Court * * * proceedings have been instituted," but the Court reported him as saying that since "the present proceeding has been pending in this court * * * proceedings * * * have been instituted," (Appendix, post p. 68, R. 36, ante p. 7.) Even when the Court's attention was called to the fact that the respondent filed the proceedings on June 17, 1943, after the appeal was granted, showing a delay of one year and eight months, the Court still withheld comment on the delay in filing the proceedings. (R. 40, petition for rehearing denied, R. 52; it is noted that in the petition for rehearing, R. 40, it was stated by error that the Attorney General omitted, and it should have been stated that the Court omitted, the fact that the proceedings were filed after the appeal was "granted".) The Court was not justified in omitting the delay in filing the proceedings and saying that by consent the proceedings were delayed after they were filed. (R. 36-37; ante pp. 7, 50.) The Court did not say, and it was never contended and can not be shown, that the delay in filing the proceedings and the statutory restraint imposed during that time were waived by consent or by any other means. The petitioner was entitled to a full and fair presentation of the facts admitted of record, particularly since the facts omitted by the Court were material to his contention.

The injunction suit did not prevent the respondent from filing condemnation proceedings. It did not seek to enjoin the respondent from filing proceedings. The respondent is estopped to claim that the injunction suit prevented him from filing the proceedings sooner, (a) because he could have filed the proceedings before the injunction suit was filed, (b) because he filed the proceedings while the injunction suit was pending, (c) because he admitted through his counsel that the delay in filing was due to his own act, and (d) because he claimed through his counsel that he waited

until the highway was completed before filing the proceedings (Appendix, post p. 68).

There is no sound basis for the argument that while the injunction suit did not prevent the filing of the proceedings, yet since the petitioner did not manifest a desire to have the proceedings filed the postponement of the filing of proceedings was justified. If this argument is sound then on the same principle false imprisonment or any act of duress is not actionable if during the restraint no desire to be released is manifested. The land owner is entitled to be "free to act promptly and upon his own motion, if he choses" (*Bragg* v. *Weaver*, supra) whether he manifests a desire to be free or not. Besides, in the injunction suit the petitioner manifested a desire to be free because he objected to the statutory restraint, and he manifested a desire to have the property condemned in a legal manner. The respondent had no right to withhold the filing of condemnation proceedings until the petitioner dropped his objections to the unnecessary destruction of the operation of his mill and to the restraint imposed by the condemnation statute. The right to exact this requirement would be equivalent to the right to frustrate the power of this Court to determine whether the statute violates the Federal Constitution. Before the respondent can justify the postponement of the filing of proceedings he must show that the petitioner was objecting to the filing of proceedings or that the petitioner was acting in a manner that prevented the respondent from filing the proceedings. Neither can be shown.

The petitioner was therefore restrained by the condemnation statute under attack before he filed the injunction suit and for one year and eight months after he filed the injunction suit, and the respondent could have released him from this restraint at any time.

Injury from Delay in Consummating Condemnation.

Evidently the Court reached the conclusion that the restraint imposed upon the petitioner by the condemnation statute (ante p. 5) is not sufficient to show that he was injured by an unconstitutional feature of the statute, although the restraint was imposed for one year and eight months while the respondent postponed the filing of condemnation proceedings, and that the unconstitutional feature of the statute is not the delay in filing the proceedings but rather the delay in consummating the condemnation procedure, which, under the statute, begins when the property is seized and may continue until the highway is completed and sixty days thereafter, and that since the delay in consummating the condemnation is caused by the mill question in the petitioner's injunction suit the petitioner can not claim that he has been injured by the delay in consummating condemnation. This view is implied from the statement of the Court that, since in the Court's opinion the property is subject to condemnation, the mill question in the injunction suit is therefore out of the way and the petitioner "is now afforded a prompt remedy in such proceedings," and that it is unnecessary for the Court to decide what would have been the petitioner's rights "if the payment of such compensation had been unreasonably delayed." (R. 37; ante p. 7.) Granting, for the sake of argument, that the unconstitutional feature of the statute is the delay in consummating the condemnation, the view of the Court is unsound because it overlooks the real cause of the delay.

By filing the injunction suit, the petitioner did not estop himself from claiming that he has been injured by the delay in consummating the condemnation of the property. The petitioner did not contend that under no circumstances could the property be condemned, and at the same time con-

tend that the statute is invalid because the petitioner was restrained from instituting condemnation proceedings. There is not a word in the bill to show that the petitioner objected to the acquisition of the title to his property by the power of eminent domain, and estoppel can not be premised upon the allegations in the bill that the respondent is not conducting the condemnation in a legal manner. The petitioner's contention was, and is now, that the condemnation of his property, in the manner in which the respondent has conducted the condemnation, is illegal for two reasons, (1) because of the unnecessary destruction of the operation of his mill, and (2) because of the restraint imposed upon the petitioner by the condemnation statute while the respondent mutilated his property. There is no inconsistency between unnecessary and unreasonable destruction of the operation of the mill and unnecessary and unreasonable restraint imposed upon the petitioner. Both are directed against the manner in which the condemnation is conducted, but neither is against the actual condemnation of the property. The injunction suit thus raises two questions, (1) whether the respondent is under a duty to preserve the water power for the mill if he can reasonably do so and still construct an acceptable highway, and (2) whether the statute under which the respondent seized the property is constitutional. These questions were precipitated by the conduct of the respondent, not by any act of the petitioner. (R. 27, 28; paragraphs 12 and 13 of bill.) They are not abstract questions of law, separate and apart from the manner in which the respondent conducted the condemnation. It is impossible to show that the respondent had no opportunity or means of preventing these questions from arising. He had control of both questions. The petitioner did not have the slightest control of either question.

The first question, relating to the respondent's duty to preserve the operation of the mill if reasonably possible,

was excluded from the case by the Court's inadequate statement of the petitioner's contention on the mill question, by the Court's unjustifiable reference to "large" pipes placed in the race, and by the Court's ambiguous statement concerning the inability of the petitioner "to impress the highway engineers with the gravity of his objections to the proposed plan" (see ante pp. 24-25), all of which left the impression that the respondent desired to do and actually did everything he reasonably could do to preserve the operation of the mill, that the operation of the mill would not be destroyed, and that the petitioner was perversely insisting upon a technical question of law relating to the condemnation of a property owned by but not essential to the operation of a public service enterprise. Instead of saying that clearly the respondent has the power to destroy the operation of the mill unnecessarily, the Court avoided that question by saying that "the State Highway Commissioner clearly has the power to condemn the property in question." (R. 36; ante p. 5).

The bill alleges and it is not denied that before the injunction suit was filed the petitioner disclosed to the respondent the method of operating the mill by water power and the destructive effect upon the operation of the mill if the respondent should persist in his plan for constructing the highway; that the petitioner pleaded with the respondent not to destroy the water power for the mill; that the respondent treated lightly the petitioner's contentions in regard to the operation of the mill; that after the respondent showed that he intended to proceed with his plan without change the petitioner requested that construction be held up to give him time to file his bill; that the respondent on the same day by written notice informed the petitioner that the construction would proceed, and that two days later the property was seized and on the next day the mutilation of the property was commenced and pipes were placed in

the race and covered with dirt. (Paragraphs 5, 7, 10-13 of bill; R. 24-28). The filing of the injunction suit did not arouse the respondent's sense of duty. Instead of coming into the suit in an equitable manner, thus opening the way for showing that actually he was not destroying the operation of the mill, the respondent by demurrer admitted the destruction and went ahead with it. Apparently he assumed that his sovereign power absorbed any duty to preserve the operation of the mill. Boldly the Attorney General claimed for the respondent the power of Napoleon. In his brief appeared the quoted statement that "the State highway commission might well say, in the words of a famous French monarch, 'L'E'tat c'est moi.'" The mill question would not have been raised in the injunction suit if the respondent, instead of assuming a Napoleonic attitude, had been willing to use care in constructing the highway so that the petitioner could continue to operate his mill. The delay caused by the mill question is, therefore, directly traceable and chargeable to the respondent's inequitable conduct, and not to the injunction suit which was precipitated by his conduct. The sovereign is amenable to the doctrine of clean hands. (*Valdez* v. *State*, 142 Fla. 123, 194 S. 388, 394). "No one shall be permitted to found any claim upon his own inequity, or take advantage of his own wrong." (*R. H. Stearns Co.* v. *U. S.*, 291 U. S. 54, 61-62).

The respondent also precipitated the constitutional question. The statute would not have been challenged if the respondent had filed proceedings simultaneously with the seizure of the property. Instead, he elected to exercise to the fullest extent the drastic powers of the statute. He made the deposit, notified the petitioner, seized and mutilated the property, waited one year and eight months and then filed proceedings, employing the proceedings as a stratagem

to confuse the issue and to frustrate the objections to the statute. The petitioner could have waited until the respondent filed the proceedings and could have challenged the statute in the proceedings, and in that case the proceedings would have been delayed at least thirteen months from June 17, 1943, when the proceedings were filed, as the trial court took thirteen months to decide the issue. By challenging the statute after the respondent seized the property instead of waiting one year and eight months until the respondent filed the proceedings, the petitioner actually prevented a delay of one year and eight months in the consummation of condemnation.

Constitutional Question Not Moot.

The Court said that unless the petitioner could show that he had been damaged by the operation of the statute, the constitutional question is moot as to him. (R. 37; ante p. 7). The petitioner contends that he has been damaged by the operation of the statute for the reasons stated (ante pp. 45-47; 53-61), and that there is no ground upon which it can be held that the constitutional question is moot.

The act of the respondent in filing proceedings operated to discontinue the statutory restraint imposed upon the petitioner, but it did not abate the injury to the petitioner from the unconstitutional restraint imposed by the statute before the proceedings were filed. (*U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 308-310; *Federal Trade Com.* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260). The filing of proceedings was not a confession by the respondent of the invalidity of the restraining feature of the statute, and the contentions on this point still continue. (*Strutwear Knitting Co.* v. *Olson*, 13 F. Supp. 384, 389-390;

Fleming v. *Jacksonville Paper Co.*, 128 F. (2) 395, 399). The respondent made no attempt to prevent the unlawful statutory restraint prior to filing the proceedings. (*Perma-Maid Co., Inc.* v. *Federal Trade Com.*, 121 F. (2) 282, 284).

The seizure of the property and the use of it for highway purposes since October 16, 1941 (R. 27, 30) are based entirely upon the statute under attack. (R. 27). If the statute is invalid the use of the property for highway purposes is illegal. (*Norton* v. *Shelby Co.*, 118 U. S. 425, 442; *Chicago, etc. R. Co.* v. *Hackett*, 228 U. S. 559, 566; *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371, 374; *Campbell* v. *Bryant*, 104 Va. 516, 52 S. E. 638, 640; *City of Richmond* v. *Eubank*, 179 Va. 70, 18 S. E. (2) 397, 404). The petitioner is entitled to compensation for the illegal use of his property prior to acquisition of title. (*Carter* v. *Town of Pearlsburg*, 173 Va. 346, 4 S. E. (2) 428).

The bill prays for injunction against unlawful construction of the highway (R. 29). The Court's conjectural statement that the highway has been completed is not based upon any evidence, ante pp. 48-49. The Attorney General admitted in his oral argument that the last layer of surfacing has not been placed on the highway (R. 40, petition for rehearing). So long as there is any construction to be done, regardless of the type of the construction, the petitioner is entitled to an injunction against it if the statute is invalid. There is no basis for saying that the bill prays for an injunction against all unlawful acts of highway construction except the last acts.

The bill contains a prayer for general relief, viz., "that complainant may have all such other, further, and complete relief as the nature of his case may require and as to equity may seem meet" (R. 29). Under this prayer may be obtained any relief arising from the admitted allegations of the bill and of the same general nature as that specifically requested and not inconsistent with it (*Woolfolk* v. *Graves*,

113 Va. 182, 69 S. E. 1039, 1044; *Southeast Lumber Export Co.* v. *Friend*, 158 Va. 863, 164 S. E. 372, 374; *Lockhart* v. *Leeds*, 195 U. S. 427, 436-437; *Waterman* v. *Canal-Louisiana Bank, etc. Co.*, 215 U. S. 33, 45). If the statute is invalid, the petitioner is entitled to an injunction against the use of the property for highway purposes prior to lawful acquisition of title, as that relief is consistent with the specific prayer for an injunction against unlawful construction of the highway. The Attorney General conceded that the constitutional question "has not, of course, become moot since title to the land has not yet actually been acquired" (Appendix, post p. 68).

Summary.

The opinion of the Court (R. 33-37) is interspersed with deficient, suggestive, and conjectural statements not justified by the record and contrary thereto, which have operated to obscure the respondent's inequities and circumventions and to enfeeble and confound the petitioner's contentions (Pages 24-25, 40-46, 47-49, 50-51, 54-55, ante).

The ruling (R. 34-36; ante pp. 3-5) by which the Court allowed the respondent to destroy unnecessarily the operation of the petitioner's mill, upon the specious reasoning that the petitioner himself could do so, discriminates against the petitioner in such a way as to deny to him the equal protection of the laws contrary to the Fourteenth Amendment of the Federal Constitution (Pages 23-39, ante).

The condemnation statute (ante p. 5) violates the due process clause of the Fourteenth Amendment of the Federal Constitution because it contains a one-sided condemnation procedure by which the land owner is restrained while the respondent mutilates the land and postpones the condemnation proceedings (Pages 40-44, ante).

The ruling (R. 36-37; ante p. 6) by which the Court denied to the petitioner the right to challenge the statute (ante p.

5) is unsound because the Court ignored the unconstitutional restraint imposed upon the petitioner by the statute and the inequitable and arbitrary conduct of the respondent which caused the delay in consummating condemnation, and allowed the respondent by an artificial act to frustrate the consideration of the constitutional question. The ruling is artificial, evasive, unsubstantial, and illusory (Pages 44-61, ante).

The constitutional question relating to the statute is not moot because if the statute is invalid the petitioner is entitled to an injunction against the construction of the highway and the use of the property for highway purposes until title is lawful acquired (Pages 61-63).

Respectfully submitted,

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